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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 3

GLENNA R. SANDERS, Plaintiff and Appellant, v. CHRISTIAN CHURCH HOMES, Defendant and Respondent.	A152249 (Alameda County Super. Ct. No. RG16814660)

Plaintiff Glenna R. Sanders, is a former employee of defendant Christian Church Homes (CCH). Sanders sued CCH under the California Fair Employment and Housing Act (FEHA) for age and race discrimination, age and race harassment, and failure to take all reasonable steps to prevent discrimination and harassment. She also sued for wrongful termination in violation of public policy and for declaratory and injunctive relief. The trial court granted summary judgment for CCH. Sanders filed a timely appeal.

We conclude that Sanders' harassment claims are time-barred, and that her remaining claims fail because she was not constructively discharged and thus suffered no adverse employment action. Accordingly, we affirm.

INTRODUCTION

Sanders is a Caucasian individual who was over the age of 40 during the relevant time periods. She worked for CCH, a non-profit provider of affordable housing, from 2001 to 2014. Sanders was originally hired as a site administrator and promoted to

operations manager in 2005. As an operations manager, she was responsible for managing various CCH properties. Her only allegations of discrimination or harassment are focused on Cletis Young, an African-American individual over the age of 40, who was her supervisor from late 2013 to 2014. The bulk of her complaints focus on the middle of 2014 during which time she had various performance issues, including poor management of a site and inappropriate supervision of employees. None of Sanders' performance issues resulted in a change to her title, income, or working conditions and she was never asked or encouraged to resign.

In August 2014, Sanders went out on medical leave and in September 2014 completed workers' compensation paperwork alleging a hostile work environment, age discrimination, and retaliation. In December 2014, she notified CCH that, "due to a forced resignation," she would not be returning to work. In December 2015, she filed a charge of age and race discrimination with the Department of Fair Employment and Housing.

Her complaint was filed on May 3, 2016.

FACTUAL BACKGROUND

All of the facts set forth herein are undisputed unless otherwise noted.

I. Sanders is Hired by CCH and Works with Young

CCH is a non-profit organization that provides affordable housing to low-income seniors and disabled individuals. CCH has been in existence for over five decades and manages 57 facilities with over 5,300 residential units. Over 75% of CCH employees are over the age of 40 and a third are over the age of 60.

Sanders, a 53-year-old Caucasian woman (who was 49 at the time of her resignation in 2014), began working at CCH in April 2001 as a site administrator. CCH promoted her to operations manager in February 2005. As an operations manager, Sanders was responsible for a property management portfolio of affordable housing projects in Northern California. Her job duties involved managing site and project staff to ensure that the properties in her portfolio functioned according to budgeted plans and

met government regulatory guidelines. Throughout her employment, Sanders received raises and bonuses, which she felt were fair.

In 2008, CCH hired Cletis Young, an African-American male. CCH promoted him to the same position as Sanders, operations manager, in 2009. For about three years, Sanders and Young were peers. Sanders stated that when Young first started as an operations manager, their relationship was "fine." However, their relationship deteriorated after about one month, when "it went from okay to we didn't even talk." Sanders did not interact with Young often, and when they did interact, most of their communications were by email or text.

In November 2012, CCH promoted Young and another operations manager, Wendy Moorhouse, a Caucasian female over the age of 40, to the position of senior operations manager and divided the supervision of the operations managers between them. Sanders remained in her operations manager role and began reporting to Moorhouse. On October 1, 2013, CCH promoted Young, who was 52 at the time, to senior director of property management and he became Sanders' direct supervisor.

After Young became Sanders' supervisor, she "only communicated with him when [she] had to," and it was usually via email or text. After Young was promoted, Sanders states her working conditions became "difficult," but they did not become "unbearable" until towards the end of her employment - "March [2014] was unbearable, and the rest was absolutely horrible."

Young is the only person that Sanders claims discriminated against her or harassed her. Young never made any derogatory or inappropriate comments about her age or race. Young did not ever send Sanders anything in writing regarding her age or race, nor did age or race come up in any of their communications. However, Young was a demanding manager of Sanders and other employees.

II. Events at the Fargo Site and Sanders' Deposition Testimony

On February 11, 2014, a human resources employee informed Young that a temporary employee at the Fargo Senior Center, one of the sites in Sanders' portfolio, may have accessed a CCH computer without authorization. Young called Sanders on

February 11; he contends it was to inquire about the incident. Sanders did not return Young's call because she was away from the office being deposed in regards to a lawsuit filed against CCH by another employee who allegedly had been terminated by Young. Sanders had not told Young that she would be away giving deposition testimony and never discussed it with him. However, Sanders states that she posted on the "white board" at CCH's headquarters that she was at the deposition, and that other employees spoke with Young about Sanders being at the deposition.

While not returning Young's call, Sanders did return a call that day from Annie Alexander, the assistant administrator at the Fargo site. Alexander informed her that Young had asked about the use of computers at the Fargo site. After speaking with Alexander, Sanders called Wendy Moorhouse to ask her to look into the computer issue and Sanders, Moorhouse and Alexander had a conference call that afternoon.

The following day, February 12,[1] Young asked Sanders to meet with him to discuss what had occurred the day before regarding the Fargo site. Young asked a CCH's human resources manager to participate in the meeting and take notes. Sanders offers contradictory and inconsistent evidence about this meeting, saying both that she promptly left with Moorhouse and saying that Moorhouse left and she remained. In her response to CCH's Undisputed Material Facts, Sanders states that "Young told Moorhouse to leave, that Moorhouse said that Sanders has a right to have someone support her, that Young said louder 'leave now,' and that Sanders said she has a right to support and then left." Similarly, in her deposition, Sanders testified that after they arrived at the meeting, Young said to Moorhouse, "You need to not be here. Leave now," that Moorhouse then said Sanders had the right to support, that Young said louder, "Leave now. You're not a part of this," that Sanders then said "I have a right to support. And if she is not going to be here, I'm not going to do this," and they then both left. However, in her declaration,

[1] The undisputed material facts state that this meeting took place on February 12, 2014, but Sanders refers to it as a February 13, 2014 meeting in her opposition to summary judgment.

Sanders states that "I brought Wendy Moorhouse with me to the meeting, but Mr. Young told her she had to leave. Ms. Moorhouse left and called [v]ice [p]resident Ian Brown, notifying him of the situation. Mr. Young grilled me at the meeting and I left in tears."

In any event, Sanders was not disciplined. There were no changes to her salary, job duties, job title, or schedule.

III. Sanders' Complaints About Young

After the above-described interactions, and still in February 2014, Sanders complained to CCH senior vice president and general manager Ian Brown that Young was harassing and retaliating against her because of her participation in the deposition.

In response to Sanders' complaints, CCH vice president of human resources, Toni Smith, met with Sanders and Young on March 3, separately, to investigate Sanders' complaints. Sanders felt the issue surrounding the temporary employee at Fargo was "a minor situation that was completely blown out of proportion" and claimed that it was retaliation because it "fell on the heels" of her deposition. Sanders told Smith that she wanted to improve communications with Young and to be treated in the same way as other operations managers. Young told Smith that he had wanted to meet with Sanders to discuss what had occurred at Fargo, and that he did not intend for the meeting to be disciplinary.

Smith advised Sanders of the results of her investigation in a March 6, 2014 letter: "I've had the opportunity to investigate your concerns and have not found any evidence substantiating any retaliation. As a threshold matter, Cletis [Young] was unaware that you were being deposed on February 11, 2014 when he called you. Based on our conversation, you also indicated that the communication problems you have been having with Cletis began to occur before this deposition. Moreover, you were not disciplined in anyway [sic] or treated in any adverse manner as a result of the deposition. With respect to the communication issues you raised, based on my investigation, it appears that the events that unfolded on February 11 were a misunderstanding. Cletis never intended on disciplining you in any manner for those events. Rather, he was seeking clarification from you as to what occurred. I have asked him to clarify that to you further. To the

extent that you contend Cletis has paid more attention to other [operations managers], some of the newer [operations managers] require more of his attention. Moreover, they are in the office more frequently than you are and are able to interact with him more as a result . . . . Nevertheless, I have not found anything inappropriate about the manner in which Cletis communicates with you."

That same day, Young emailed an apology to Sanders: "First let me say that I'm sorry for all the drama around the temp at Fargo. It certainly wasn't my intention. I heard conflicting things from different sources and was really just trying to figure out what happened . . . . So hopefully, we can put this issue to rest and keep working on the real issues in our communities." Sanders responded by email stating that she appreciated his email and agreed with him.

IV. Sanders' Performance Issues

In June 2014, CCH hired Miracle Freeman to serve as the site administrator for the Fargo Senior Center. On July 23, Freeman provided Don Stump, CCH president and CEO, with a signed statement outlining her concerns regarding Sanders' management of the Fargo site. The statement was also signed by Annie Alexander, the assistant administrator at Fargo. The statement described Sanders' mishandling of paperwork requirements to the point where there was concern that it could jeopardize the property's financing and ability to continue its operations. In addition, the statement described Sanders as utilizing "bullying and unnecessary pressure to keep her staff in line."

Upon investigating the situation at the Fargo site, Stump, Smith, and Young determined that Sanders was ill-equipped to handle the complex issues at Fargo. On July 27, 2014, Young notified Sanders that he was temporarily reassigning Fargo to another portfolio. He stated, in relevant part: "As you know there are many file issues related to lease up activities at the site. My review of these issues compels me to make the difficult decision to temporarily reassign Fargo Senior Center to another portfolio. This reassignment will remain in place until we can complete the needed file repairs . . . . Making an unplanned portfolio shift such as this may come as a surprise to you and cause you to have questions and concerns. It's important that I hear your viewpoint and

feelings on this matter . . . ." Other than the removal of the Fargo site from Sanders' portfolio, her job did not change and her title and pay remained the same. Sanders acknowledged that operations managers' portfolios "shifted all the time," and that managing a greater number of sites does not provide any advantage to an operations manager.

On or about August 5, 2014, Young stopped by Sanders' office and asked her to meet with him and CCH vice president of human resources Smith. Sanders responded that she could not meet because she could not get an attorney there that quickly. Sanders called in sick the following day.

Senior vice president Brown emailed Sanders what he characterized as a final written warning on August 6, 2014: "Given the consistency of the allegations raised and the credibility of those who raised them, we remain concerned about the allegations. We are particularly concerned about your overall intimidating style of management . . . . While I understand that some of the Fargo filing issues may have been the result of misdirection you received previously from the Compliance Department, nevertheless, given the concerns that have been raised at the Fargo Senior Center, I have asked your direct supervisor, Cletis Young, to permanently reassign that site to another [operations manager]. This will give us time to problem solve and help ameliorate the issues there. He will be reassigning you a new property. Your salary, job title, and responsibilities will otherwise not be changed . . . . Furthermore, Glenna, this is your final written warning that you must immediately improve your management and conduct. As the [operations manager], you are expected to lead by example – not by fear and intimidation . . . . If you are unable to improve in these areas and to sustain that improvement, we will take further action up to and including the possibility of termination." Sanders does not claim that Brown had any discriminatory animus towards her.

V. Sanders Goes out on Medical Leave and Resigns

On August 8, 2014, two days after receiving the final written warning, Sanders went out on medical leave under the Family and Medical Leave Act (FMLA). On August 11, she sent a text message to CCH president Stump stating that she had retained an

attorney and that she had been harassed by Young. Stump responded that he was "sorry to hear" that Sanders felt this way, that he would "like to understand the basis for" her concerns, and asked her to provide him with more information. When Sanders did not respond to Stump's request for information, Smith followed up with Sanders by email to try to learn more about her concerns. Sanders did not respond to Smith's request for additional information.

On August 15, Young emailed Sanders notifying her that he was adding two new sites to her portfolio and reassigning Fargo: "I hope you are doing well. I did not want to burden you with this while you were out sick, but I have just been informed that you will be out a bit longer. I want you to know that when you are feeling better and you return to work, Sylvester Rutledge and Bishop Roy [two other properties] will be added to your portfolio responsibilities and Fargo will be transferred as a new portfolio . . . .We will take care of your responsibilities while you are out. Please just focus on getting better." CCH assigned the Sylvester Rutledge and Bishop Roy sites to Sanders because they jointly consisted of approximately the same number of units as Fargo. This change did not impact Sanders' title or pay. This email was the last communication Sanders had with Young, and she contends that this was also Young's last discriminatory and/or harassing act.

In September 2014, while on leave, Sanders completed workers' compensation paperwork alleging a hostile work environment, age discrimination, and retaliation. Smith reached out to Sanders several times to attempt to elicit more information, but Sanders refused to provide any details. Smith offered to speak with Sanders over the phone, meet with her at a location of her choice, have her provide a written statement or answer written questions; Sanders declined. Instead, Sanders accused Smith of failing to properly address her March 2014 complaint of retaliation against Young and her "situation only got worse" after she complained.

In response, on September 18, 2014, Smith emailed Sanders: "As you know, I promptly investigated your [March 2014] complaint and found no evidence of retaliation. Your email to me from yesterday is the first time that you have informed me that your

situation "only got worse" and that you feel that I did not address the issues you raised. I also understand based on your recent workers' compensation form that you are now complaining of a hostile work environment and age discrimination, in addition to retaliation. In order to better understand the nature of your concerns, I need more information from you . . . . If it is helpful to you, I can provide you with a list of questions in advance of our meeting or you can respond to my questions in writing. Alternatively, we can meet when you return from your leave. Please let me know what you prefer to do . . . ." Sanders never responded to Smith's requests.

Sanders' FMLA leave expired on October 31, 2014. CCH granted her additional leave until November 30, 2014. CCH later learned that while Sanders was out on medical leave, she was in the process of setting up a new business. Sanders entered into a commercial lease agreement for her new business, "Glenna's Rescued Treasures," on December 1, 2014, while still employed by CCH.

On December 17, 2014, Sanders sent an email to CCH stating: "Be advised that due to a forced resignation I will not be return[ing] to CCH as an [o]perations [m]anager. After several attempts to resolve the retaliation and harassment issues I have endured, and at the recommendation of my doctors, there is no way my health can handle any additional stress from Cletis Young or HR. This decision is very difficult for me because I really enjoyed my work and the seniors that I served. My plan was to retire from CCH, however, due to the current situation, that has become impossible."

Smith responded the same day by email to Sanders: "I am sorry to hear that you are resigning from your position. I want to be very clear, however, that while we accept your resignation, CCH is in no way forcing you to resign. To the contrary, we would welcome you to stay at CCH. I invited you many times to meet with me to discuss your claims of retaliation and harassment, but you declined our invitation. I still encourage you to set up a time to meet with me at your convenience to discuss your concerns. We take your concerns very seriously and sincerely want to hear more about your concerns, such that we have sufficient information to address them."

Sanders did not respond to Smith's invitation to discuss her concerns. No one at CCH terminated her employment or told her that she had to resign. Sanders was 49 years old at the time of her resignation.

At the time Sanders resigned, she was the operations manager for nine properties. CCH redistributed seven of her nine properties among three existing operations managers; four properties were redistributed to an employee who was 57 years old, two were redistributed to an employee who was 53, and one was redistributed to an employee who was 38. The other two properties were distributed to temporary employees, ages unknown.

PROCEDURAL BACKGROUND

On December 15, 2015, Sanders filed a complaint alleging age and race discrimination and harassment with the Department of Fair Employment and Housing (DFEH). She obtained a right to sue notice the same day.

On May 3, 2016, Sanders filed a complaint against CCH in the Superior Court of Alameda County alleging seven causes of action: (1) age discrimination under FEHA; (2) race discrimination under FEHA; (3) wrongful termination in violation of public policy; (4) race harassment under FEHA; (5) age harassment under FEHA; (6) failure to prevent harassment and discrimination under FEHA; and (7) declaratory and injunctive relief. Her barebones complaint is devoid of any specific allegations of discrimination or harassment. The only adverse employment action alleged is that "her resignation was a constructive discharge."

CCH moved for summary judgment. The trial court issued a detailed ruling granting summary judgment for CCH and dismissing the complaint.[2] Judgment was entered for CCH and Sanders timely appealed.

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[2] The trial court, as it was permitted, did not rule on approximately 100 evidentiary objections filed by CCH "because the admissibility of the evidence which CCH objects to is not material to the court's disposition of the motion." (See Code of Civ. Proc. § 437c, subd. (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems

DISCUSSION

I. Summary Judgment and the Standard of Review

Code of Civil Procedure section 437c, subdivision (c), provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more of its elements cannot be established or it is subject to an affirmative defense. (Code Civ. Proc. § 437c, subds. (p)(2), (o)(1); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) Once a defendant meets this burden, the burden shifts to the plaintiff to show the existence of a triable issue of material fact. (Code Civ. Proc. § 437c, subd. (o); *Aguilar, supra*, 25 Cal.4th 826 at p. 850.)

For summary judgment motions, " 'the pleadings "delimit the scope of the issues" to be determined and "[t]he complaint measures the materiality of the facts tendered in a defendant's challenge to the plaintiff's cause of action." [Citation].' " (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253.) "[A] 'defendant moving for summary judgment need address only the issues raised by the complaint. . . .' " (*Ibid*.) "As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense." (*Sturgeon v. Bratton* (2009) 174 Cal.App.4th 1407, 1418; Code Civ. Proc. § 437c, subd. (p)(2).)

Discrimination claims under FEHA are analyzed under a three-step framework. " '[T]he employee must first establish a prima facie [showing] of wrongful discrimination. If she does so, the burden shifts to the employer to show a lawful reason for the action. Then the employee has the burden of proving the proffered justification is mere pretext.' " (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1730 (*Martin*).) "While the plaintiff's prima facie burden is 'not onerous,' [Citation], he must at least show 'actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based

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material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."])

on a [prohibited] discriminatory criterion . . . .' [Citations.] [Citation.]" (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*).)

Application of this three-stage test in the context of the summary judgment, however, means a defendant seeking summary judgment bears the initial burden of negating an essential element or establishing a defense (Code Civ. Proc., § 437c, subd. (o)(2)) and that plaintiffs "will not be required to respond unless and until the defendant has borne that burden. [Citations.] In this sense, upon a defendant's summary judgment motion in an employment discrimination action 'the burden is reversed. . . .' [Citation.]" (*Martin, supra,* 29 Cal.App.4th at pp.1730–1731.) If the defendant, as the moving party, carriers its initial burden, then the plaintiff must demonstrate that the defendant's showing was in fact insufficient or that there is a triable issue of fact material to the defendant's showing. (*Id.* at p. 1732; see *Sandell v. Taylor-Listug, Inc.,* 188 Cal.App.4th 297, 309 (*Sandell*) [" '[i]f the employer presents admissible evidence . . . that one or more of the plaintiff's prima facie elements is lacking . . . the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing . . . .'[Citation.]"] (italics omitted).)

We review an order granting summary judgment de novo. (*Aguilar, supra,* 25 Cal.4th 826 at p. 860.) "We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. [Citation.]" (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*).) "The court focuses on issue finding; it does not resolve issues of fact." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.)

We will address each of Sanders' causes of action, though not in the order they appear in the complaint. We reorder them to facilitate our discussion of the claims and CCH's grounds for summary judgment.

II. The Fourth and Fifth Causes of Action for Race and Age Harassment Under FEHA Are Untimely

Before filing a civil action under FEHA, a party must file an administrative complaint with the Department of Fair Employment and Housing (DFEH) and receive a

right to sue letter. (Gov. Code § 12960; see *Romano v. Rockwell International, Inc.* (1996) 14 Cal.4th 479, 492.) The limitations period for seeking administrative remedies is one year "from the date upon which the alleged unlawful practice or refusal to cooperate occurred." (Gov. Code § 12960(d).)

As described above in the factual summary, Sanders' claim of harassment is focused exclusively on Young, who was her supervisor from late 2013 to 2014 with the bulk of her complaints focused on the middle of 2014. The very last communication between Sanders and Young took place on August 15, 2014, making it the last possible date of harassment.

Sanders incorrectly contends that the DFEH filing was timely as to her harassment claims because it was within one year of her resignation on December 17, 2014, citing to *Green v. Brennan* (2016) 136 S.Ct. 1769 and *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238 (*Turner*) in support of her claim. However, these cases stand for the proposition that the operative date for the administrative limitations period for a *constructive discharge* cause of action is the date the employee gave notice of the forced resignation. Sanders does not offer any argument or authority for the proposition that she could file a complaint with the DFEH for race and age harassment, as opposed to constructive discharge, within one year of her date of discharge.

We affirm the trial court's grant of summary judgment as to the fourth and fifth causes of actions for, respectively, race and age harassment under FEHA since they are time-barred for failure to timely file a DFEH complaint. (Gov. Code, § 12960(d); see *Trovato v. Beckman Coulter, Inc*. (2011) 192 Cal.App.4th 319, 323–325 [summary judgment granted in favor of employer where no specific act of harassment identified within one year of the filing of a DFEH complaint and employee left job a few months after last specific act of harassment].)

III. The First and Second Causes of Action for Age and Race Discrimination Fail as There Was No Constructive Discharge and, Therefore, no Adverse Employment Action

Sanders' first cause of action for age discrimination and second cause of action for race discrimination are based solely and entirely on one adverse employment action: "[t]he termination of [her] employment by defendants." Further, and as the trial court correctly noted, "[i]n any event, a claim based on adverse employment action prior to December 15, 2014 would be time-barred by the failure to submit a timely administrative complaint."

Sanders contends that repeated acts of harassment can amount to an adverse employment action. However, her fourth and fifth causes of action for harassment under FEHA are barred by the one year statute of limitations because the undisputed facts demonstrate that: (1) the last act of alleged harassment/discrimination occurred on August 15, 2014; and (2) Sanders filed her DFEH complaint on December 15, 2015. Just as Sanders' harassment causes of action are untimely, so is any alleged adverse employment action that occurred before December 15, 2014. (Gov. Code § 12960(d).)

In order to state a prima facie case of age discrimination, Sanders must present evidence that she "(1) is over the age of 40; (2) suffered an adverse employment action; (3) was performing satisfactorily at the time of the adverse action; and (4) suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination, i.e., evidence that the plaintiff was replaced by someone significantly younger than the plaintiff." (*Sandell, supra,* 188 Cal.App.4th at p. 321; see Gov. Code. § 129040, subd. (a).) Similarly, in order to meet the burden of establishing a prima facie case of race discrimination, a plaintiff must provide evidence that (1) she was a member of a protected class; (2) she was performing competently in the position she held; (3) she suffered an adverse employment action, such as termination, demotion, or denial of an available job; and (4) some other circumstance suggests a discriminatory motive. (*Guz, supra,* 24 Cal.4th at p. 355.) Both contain the essential element of an adverse employment action and, as described below, this is where Sanders' complaint fails.

An adverse employment action "requires 'a substantial adverse change in the terms and conditions of the plaintiff's employment.' [Citation] " (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1063.) Minor adverse actions that,

from an objective viewpoint, are "reasonably likely to do no more than anger or upset an employee cannot be properly viewed as materially affecting the terms, conditions, or privileges or employment and are not actionable. . . ." (*Yanowitz*, *supra*, 36 Cal.4th at pp. 1054–1055; see *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357 [" 'workplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate the act or omission to the level of a materially adverse employment action.' [Citation]"].)

The trial court found that Sanders did not meet her burden to establish a prima facie showing of age or race discrimination. While Sanders was over 40, she did not show an adverse employment action as "it is undisputed that the Plaintiff was not constructively terminated. The evidence before the court does not show harassment or a hostile work environment based on Plaintiff's age or race, but instead indicates that complaints were made about Plaintiff's work performance. . . . The evidence falls short of showing that a reasonable person faced with the conditions of employment imposed by CCH would be compelled to resign."

We agree. The undisputed facts demonstrate that CCH has carried its initial burden to establish that there was no constructive discharge, and thus, no adverse employment action taken against Sanders. In response, Sanders has failed to present facts demonstrating a triable issue of fact and, therefore, summary judgment was properly granted. (*Guz*, *supra*, 24 Cal.4th at p. 354.)

A. A Constructive Discharge Claim Requires a Showing of Objectively Intolerable or Aggravated Working Conditions that Compel Resignation

" 'Constructive discharge, like actual discharge, is a materially adverse employment action.' " (*Steele v. Youthful Offender Parole Board* (2008) 162 Cal.App.4th 1241, 1253 (*Steele*).) The California Supreme Court held that to establish constructive discharge, an employee must "plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's

resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.) The law does " 'not . . .guarantee[] a working environment free of stress' " and "an employee cannot simply 'quit and sue,' claiming he or she was constructively discharged." (*Id.* at pp. 1246–1247.)

To establish a claim for constructive discharge, the working conditions giving rise to the employee's resignation must be "sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.) "The standard by which a constructive discharge is determined 'is an objective one, and the proper focus is on the working conditions themselves [Citation]. ' " (*Simers v. Los Angeles Times Communications LLC* (2018) 18 Cal.App.5th 1248, 1270 (*Simers*).) "Bruised egos and hurt feelings are not part of the *Turner* equation." (*Gibson v. ARO Corp.* (1995) 32 Cal.App.4th 1628, 1637 (*Gibson*).)

In *Turner*, the plaintiff relied "on three kinds of allegedly intolerable conditions that he claims precipitated his resignation in 1989: (1) the alleged illegal acts of other ABI employees which he observed and reported in 1984; (2) his reassignment [to a different position with the same salary and level of responsibility] in 1985; and (3) his low performance rating in 1988." (*Turner, supra,* 7 Cal 4th at p. 1254.) The court held that "[n]one of these purported conditions creates a triable issue of material fact" preventing summary judgment for the employer on plaintiff's constructive discharge claim. (*Ibid.*)

In *Simers, supra,* 18 Cal.App.5th at p. 1270, the intolerable conditions alleged by the plaintiff, who was a well-known newspaper columnist, included reductions and a

suspension of his columns, a demotion, and harsh criticism from his managing editor.[3] There, the trial court granted judgment notwithstanding the verdict on plaintiff's constructive discharge claim, holding that "[w]e conclude, as a matter of law, that none of these circumstances, alone or in combination, amount to working conditions that are either unusually aggravated or a continuous pattern of mistreatment." (*Id*. at p. 1271) The court explained that there was no evidence to support some of the claim, and that other circumstances "consist only of plaintiff's subjective reaction to standard employer disciplinary actions." (*Ibid*.) The court emphasized that "[i]t is the working conditions themselves – not the plaintiff's subjective reaction to them – that are the sine qua non of a constructive discharge." (*Id.* at p. 1274.)

B. CCH Has Carried Its Initial Burden of Establishing That Sanders Was Not Constructively Discharged

CCH established that no reasonable employee in Sanders' position would have found her working conditions to be so "intolerable or aggravated" as to compel her resignation. (*Turner, supra,* 7 Cal.4th at p. 1245.) Without a viable constructive discharge claim, Sanders is left without any adverse employment action taken against her. Thus, CCH has carried its initial burden to negate an essential element in Sanders' prima

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[3] The facts plaintiff offered in support of his constructive termination claim included: (1) a reduction in his columns from three to two per week; (2) a statement by the newspaper managing editor, conveyed to plaintiff, that he was a "public embarrassment"; (3) the managing editor's criticism that "plaintiff's writing was sloppy and not up to the [newspaper's] standards; (4) "[f]alse accu[sations] of unethical conduct"; (5) the suspension of his columns " 'for an unreasonable 55 days' "; (6) plaintiff was "told not to say anything" about the investigation, so he could not " 'explain himself to his sources . . . and fans, damaging his journalistic resources' "; (7) he was " '[d]amaged in this professional reputation with his column inexplicably absent for two months' "; (8) his demotion to an " 'entry-level assignment position, based upon false policy violations resulting from discriminatory motives' "; (9) a final warning that " 'placed [him] on a performance plan warning of potential termination' "; and (10) " 'an offer of "an ambiguous columnist position, reporting to editors who falsely accused him and called him untrustworthy.' " (*Simers, supra,* 18 Cal.App.5th at pp. 1270–1271.)

facie case of age and race discrimination under FEHA. (See *Martin, supra*, 29 Cal.App.4th at p. 1730–1731.)

Sanders was never asked or encouraged to resign. Sanders emailed her "forced resignation" to CCH on December 17, 2014. Toni Smith, the vice president of human resources, responded the same day, telling Sanders that she was "sorry to hear that you are resigning from your position," and that "while we accept your resignation, CCH is in no way forcing you to resign. To the contrary, we would welcome you to stay at CCH." Smith encouraged Sanders to meet with her to discuss her concerns, but Sanders did not respond.

Sanders' job title and overall duties did not change during her employment and her pay went up every year. Throughout her employment, Sanders received raises and bonuses, which she felt were fair. Sanders contends her "intolerable" working conditions include the reassignment of the Fargo Senior Center and the transfer of two "unfavorable" properties into her portfolio after concerns were raised about her management of the Fargo site. Although Sanders was unhappy with this change, she admitted that the operations managers' portfolios often shifted and that this reassignment did not affect her job title or pay. We agree with the trial court's conclusion that while Sanders' "loss of her duties with regard to the Fargo Senior Center and the transfer of two different properties into her portfolio might be viewed as a demotion of sorts, a poor performance rating or demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (citing *Turner, supra*, 7 Cal.4th at p. 1247; see *Simers, supra,* 18 Cal.App.5th at p. 1271 ["plaintiff's subjective reaction to standard employer disciplinary actions – criticism, investigation, demotion, performance plan . . . are well within the employer's prerogative for running its business. Unless those standard tools are employed in an unusually aggravated manner or involve a pattern of continuous mistreatment, their use cannot constitute constructive discharge"]; see also *Casenas v. Fujisawa USA, Inc.* (1997) 58 Cal.App.4th 101, 115 [summary judgment for employer upheld where unfair performance rating and failure to consider employee for a promotion did not, as a matter of law, constitute intolerable conditions]; *Addy v. Bliss &*

Glennon (1996) 44 Cal.App.4th 205, 218–219 [denial of training and demotion did not create triable issues of material fact on constructive termination claim].)

Young is the only person that Sanders claims harassed her or discriminated against her. Young was a demanding manager, but he was demanding of all of the employees he supervised, not just Sanders. Young never made comments about Sanders' race or age. Young and Sanders did not communicate often, and it was usually via email or text. Sanders argues in her opening brief that Young made her working conditions intolerable by "bullying and interrogating [her] in meetings" without citing any specific evidence. The facts concerning Young's interactions with Sanders fall far short of being "so intolerable or aggravated" that a "reasonable person in the employee's position would be compelled to resign." (*Turner*, *supra*, 7 Cal.4th at p. 1251; see *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1171 ["[w]hile the conduct may not be 'ordinarily . . . encouraged,' employers have the right to unfairly and harshly criticize their employees, to embarrass them in front of other employees, and to threaten to terminate or demote the employee. [Citations]" unless there is "a continuous course of such actions, uncorrected by management."])

Moreover, the facts do not support a conclusion that Young was primarily responsible for the events that led to Sanders' medical leave and decision to resign. Smith, as vice president of human resources, investigated Sanders' complaints of retaliation in March 2014 and found them to be unfounded; Miracle Freeman, the Fargo Site administrator, and Annie Alexander, the assistant site administrator, prepared the detailed July 23, 2014 complaint about Sanders' conduct; and Ian Brown, senior vice president and general manager, made the decision to permanently reassign the Fargo site and prepared the August 6, 2014 final written warning to Sanders.

We find that CCH established, as a matter of law, that Sanders was not subjected to objectively intolerable working conditions that compelled her resignation. (*Turner*, *supra*, 7 Cal.4th at p. 1254.) CCH carried its burden to establish that Sanders was not constructively discharged and thus demonstrated that she failed to establish that she suffered an adverse employment action.

C. Sanders Has Failed to Present Facts Demonstrating a Triable Issue of Fact on Her Constructive Discharge Claim

In opposition to CCH's motion for summary judgment, Sanders failed to present facts that would create a triable issue of fact on her constructive discharge claim. Although Sanders contends that her working conditions were "absolutely horrible" towards the end of her employment, the information she submitted in support of her opposition falls far short of demonstrating any such working conditions.

Sanders claims she was "harassed and constructively discharged on account of her providing damaging testimony [on February 11, 2014] against Mr. Young in a deposition." As set forth in section II of the Factual Background, two events occurred on February 11, 2014: Sanders attended a deposition in a lawsuit filed by another employee; and (2) a human resources employee informed Young that a temporary employee at the Fargo Senior Center, one of the sites in Sanders' portfolio, may have accessed a CCH computer without authorization, which Young attempted to contact Sanders about. Sanders admits that she was not disciplined in any way as a result of anything that occurred on February 11, 2014, and that there were no changes to her salary, job duties or schedule. After Young emailed an apology to Sanders for "all of the drama around the temp at Fargo," she responded with an email stating that she appreciated his email and that she agreed with him. As explained in the Factual Background, Sanders offers conflicting accounts of a meeting where Young "grilled [her] . . . and she left in tears." However, neither account rises to the level of objectively "extraordinary and egregious" working conditions. (*Turner, supra*, 7 Cal.4th at p. 1246; see *Simers, supra*, 18 Cal.App.5th at p. 1271 ["plaintiff's subjective reaction to standard employer disciplinary actions – criticism, investigation, demotion, performance plan . . . are well within the employer's prerogative for running its business. Unless those standard tools are employed in an unusually aggravated manner or involve a pattern of continuous mistreatment, their use cannot constitute constructive discharge."]

Sanders also contends that she was "falsely accused of misconduct on several occasions." She appears to base this contention on CCH's responses to investigations of

her performance issues, including: being "bombarded with false accusations" during CCH's review of her performance problems at the Fargo Senior Center; an incident in May 2014 where Young did not respond to Sanders' concerns about an accusation that she had inappropriately negotiated deals with temporary agencies; a June 2014 interview process for a janitorial employee where Sanders was "wrongfully accused" of destroying an interview card; and "unfair accusations" in her final written warning from Brown. However, it is undisputed that none of these incidents resulted in a change to Sanders' pay, job title, or overall responsibilities. Her subjective reactions to such incidents do not support a constructive discharge claim. (*Turner*, *supra*, 7 Cal.4th at p. 1255 [" '[i]n order to properly manage its business, every employer must on occasion, review, criticize, demote, transfer, and discipline employees' "]; see *Gibson*, *supra*, 32 Cal.App.4th at p. 1636 [criticism of an employee's job performance, even "unfair or outrageous" criticism "does not create the intolerable working conditions necessary to support a claim of constructive discharge"] (italics omitted).)

Sanders includes in her list of "intolerable or aggravated" working conditions that Young "ostraciz[ed] her and her fellow long-term [o]perations [m]anagers" and that he "hir[ed] younger African-American workers and treat[ed] them more favorably." However, Young's treatment of the other operations managers is not material to a determination of whether Sanders' working conditions were so "intolerable or aggravated at the time of [her] resignation that a reasonable employer would realize that a reasonable person in [Sanders'] position would be compelled to resign." (*Turner*, *supra*, 7 Cal.4th at p. 1251.) When Sanders raised the issue of Young paying more attention to other employees, Smith explained that some of the newer employees required more of Young's attention. Although Sanders may have been unhappy that Young favored other employees, "[b]ruised egos and hurt feelings are not part of the *Turner* equation." (*Gibson*, *supra*, 32 Cal.App.4th at p. 1637.) The proper focus of a constructive termination analysis is "on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner*, *supra*, 7 Cal.4th at p. 1246.)

The remaining facts Sanders offers related to her working conditions are: (1) in May 2014, Young notified the operations managers that they could no longer attend Friday meetings by phone, which meant that Sanders could no longer work from home on Fridays as she had done for many years; and (2) in June 2014, her input was "by-passed" in the interview process for an administrator for the Fargo site. Again, this falls far short of demonstrating an objectively intolerable work environment. (See *Turner*, *supra*, 7 Cal.4th at p. 1247 [" '[a]n employee may not be unreasonably sensitive to his [or her] working environment . . . . Every job has its frustrations, challenges and disappointments; these inhere in the nature of work' "].)

Sanders argues that her cited constructive termination cases involve "facts less egregious" than her case, and that CCH has failed to distinguish these cases. However, these cases do not help Sanders because they all involve circumstances that are either inapposite to the facts of this case or that are far more egregious. (See *Steele*, *supra*, 162 Cal.App.4th at p. 1257 [supervisor concealed retaliatory motive to get young employee, new to state service "out of the way" of a sexual harassment investigation by issuing "a baseless and inappropriate level of disciplinary action that would detrimentally affect her future employment in state service" after she was kissed by agency board chairman]; *Velente-Hook v. Eastern Plumas Health Care* (E.D. Cal. 2005) 368 F.Supp.2d 1084, 1102 [triable issues on constructive discharge claim where defendant failed to offer plaintiff a reasonable accommodation and engage in interactive process after she completed treatment for breast cancer]; *DesRosiers v. Hartford* (E.D. Cal. 2013) 979 F.Supp.2d 1036, 1051–1052 [factual questions existed in constructive termination claim where employee who suffered uncontrolled incontinence suffered a protracted accommodation process, insufficiency of accommodations, and poor treatment in accommodation process]; *Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1057 [continuous pattern of discrimination against former police officer included "discriminatory promotional examinations, deprivation of training opportunities, having to meet a higher standard of performance than non-Hispanics, and denial of assignments which could have led to advancement opportunities."])

Even viewing the evidence in the light most favorable to Sanders, the facts presented fail to survive the *Turner* test of being so objectively "extraordinary and egregious" that they caused her resignation to be coerced. (*Turner*, *supra*, 7 Cal.4th at p. 1246.) Thus, she has not met her burden of showing that there is a triable issue of material fact on her constructive discharge claim. We hold, therefore, that Sanders has failed to establish a prima facie case of age or race discrimination under FEHA.

IV. The Third Cause of Action for Wrongful Termination in Violation of Public Policy Fails as There was no Wrongful Termination

Sanders' third cause of action is for constructive terminated in violation of policies against age and race discrimination, and in violation of public policies protecting her for testifying in a deposition in a civil lawsuit.

To establish a cause of action for wrongful termination in violation of public policy, Sanders must establish: (1) an employer-employee relationship; (2) termination of her employment; (3) the termination was "substantially motivated by a violation of public policy"; and (4) the termination caused her harm. (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154 (*Yau*).)

Sanders stated in her opposition to the motion for summary judgment that, "[a]lthough this claim is not articulated well in Plaintiff's Complaint she would like the opportunity to amend the Complaint to clearly allege [the nexus between the deposition and her termination] if necessary." The trial court correctly denied the request as "Plaintiff does not identify the new acts taken against her that she can allege and the evidence before the court shows that there is no triable issue with regard to acts of retaliation directed against Plaintiff as the result of her deposition testimony [¶]. . .[¶] [t]he court concludes that there are no triable issues with regard to the Third Cause of Action and that it cannot be amended to state a viable claim for retaliation by Young for Plaintiff's deposition testimony." We agree with the trial court's findings that the evidence of retaliation offered by Sanders cannot be characterized as retaliation by Young and is not linked to her deposition testimony.

As detailed above, Sanders has not met her burden of showing there is a triable issue of material fact on her constructive discharge claim. Because the undisputed facts demonstrate that Sanders was not constructively terminated, there is no basis for a cause of action for wrongful termination in violation of public policy. (*Yau*, *supra*, 29 Cal.App.4th at p. 154.)

We affirm. Summary judgment was properly granted as to Sanders' third cause of action for wrongful termination in violation of public policy without leave to amend.

V. The Sixth Cause of Action for Failure to Take All Reasonable Steps to Prevent Discrimination and Harassment under FEHA and Seventh Cause of Action for Declaratory and Injunctive Relief Fail as No Underlying Causes of Action Remain

Sanders' claims for harassment are time barred and she fails to identify a triable issue in regards to her claims of discrimination. Thus, no underlying causes of action remain to support her sixth and seventh causes of action and the trial court correctly granted summary judgment as to Sanders' sixth cause of action for failure to investigate or prevent discrimination or harassment under FEHA. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289 [" '[t]here is no logic that says an employee who has not been discriminated against can sue an employer . . . for not having a policy to prevent discrimination when no discrimination occurred. . . .' "]

The trial court likewise correctly granted summary judgment as to Sanders' seventh cause of action seeking a declaration that her age and race were motivating factors in the decision to constructively terminate her employment and to harass her and seeking an injunction to prevent CCH from future discrimination and wrongdoing.

DISPOSITION

The order is affirmed. Defendant is entitled to recover its costs on appeal.

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Petrou, J.

WE CONCUR:

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Siggins, P.J.

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Fujisaki, J.